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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1945.

No. 1171

BIRCH RANCH AND OIL COMPANY, a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved.

Under the provisions of paragraph (c) (4) of Section 23, and of Sections 41 and 43, of the Revenue Acts of 1936 and 1938, petitioner claimed a deduction of $120,000 on its income tax return for the years 1937 and 1939, accrued on its books to meet taxes of California Reclamation District No. 2035. The commissioner disallowed the deduction, with the exception of a small amount paid by

taxpayer in cash, based upon conclusions: That petitioner's system of accounting as to its Conaway ranch operations is upon a cash basis; that such payments constitute not taxes but interest not deductible unless paid within two and one-half months after the close of the taxable year; and that "the form employed in creating the alleged liability is unreal and a sham," including the validity and reality of said bonds, said reclamation district, and petitioner's existence as a separate corporate entity. [R. 40.]

Petitioner sought a redetermination in the Tax Court of the right to deduct the whole of said $120,000 on the grounds that: Its system of accounting as to all of its operations, including the Conaway ranch, is on an accrual basis in accordance with the provisions of section 43 of said revenue acts; that said item represents not interest but taxes; and that each of the commissioner's other findings are also erroneous. [Assignments of Error, 4a to 4bb, R. 50 to 12.]

The Tax Court disallowed the deduction, with the exception of an additional small amount allowed upon the theory that such additional amount was also a payment of interest made in cash within said required period. With reference to petitioner's system of accounting, it would seem that it made findings of primary facts establishing that every item of account which could properly be entered as an accrued item was so entered. It reported on an accrual basis the only accrued item which concerned the ranch. It found:

> "All crops grown on the ranch during a given fiscal year are sold in the same year in which grown. The herd of sheep is kept at an average of 3,500, with losses being replaced by younger animals. All sales are made for cash, as are all purchases. The peti-

tioner keeps a separate set of books with respect to the ranch operations." * * * [R. 97.]

"The petitioner in its income tax returns for the fiscal years 1937 and 1939 claimed for each year a deduction of $120,000, *representing the amount accrued on its books* to cover interest on the bonds of Reclamation District No. 2035." * * * [R. 98.]

"In addition to the ranch and the interest in the Birch Oil Company, the petitioner owns a citrus grove and various rental properties, including two small farms. The income from the expenses incident to those properties *are entered on petitioner's books as they accrue.*" (Emphasis added.) [R. 98.]

Notwithstanding the aforesaid findings of primary facts, the Tax Court concluded that petitioner's "ranch books are kept on a cash basis" [R. 97.] and that such portion of the aforesaid deductions as is allowable at all is allowable not as taxes but as interest, thereby, petitioner contends, raising two "clear-cut mistakes of law." The Tax Court also made findings of primary facts in substantial detail favorable to taxpayer upon each of the other aforesaid issues. [R. 83 to 100.] It failed, however, to make any ultimate finding or conclusion upon any of such other issues. [R. 101 to 108.]

Petitioner sought review in the Circuit Court of Appeals upon the ground not only of such asserted clear-cut mistakes of law but upon the further ground that a taxpayer is entitled in a tax case to ultimate findings upon all issues raised.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347). Judgment was entered in this case by the United States Circuit Court of Appeals on January 7, 1946. [R. 241.] A petition for rehearing was filed February 6, 1946, and an order denying said petition was made and filed February 13, 1946. [R. 242.]

Questions Presented.

1. Whether a clean-cut mistake of law is presented where the Tax Court found that petitioner entered on its books of account every item of accounts receivable and payable as the same accrued and concluded nevertheless that its books of account are kept on a cash basis.

2. Whether a payment by a land owner in a California reclamation district to the county treasurer in cash, or with interest coupons of reclamation bonds of such district, is deductible in its income tax return as taxes, and not as interest.

3. Where assertedly erroneous findings of the Commissioner of Internal Revenue in assessing a deficiency income tax seriously affect the market value of a taxpayer's assets, its status as a separate corporate entity, and leave uncertain the character of its system of accounting and its future tax liability, and where taxpayer expressly seeks a redetermination of, and the Tax Court finds primary facts favorable to the taxpayer upon, each of such issues, whether taxpayer is entitled to ultimate findings and conclusions thereon, particularly in view of the fact that declaratory, or any other form of, relief is not available in tax matters.

Reasons for Granting the Writ.

1. The Tax Court made primary findings of fact establishing that petitioner entered on its books of account every item of accounts receivable and payable as the same accrued, including the only accrued item which concerned the ranch. [R. 98.] It did not find that this system did not correctly reflect petitioner's net income. It nevertheless concluded that its ranch books are kept on a cash basis. The circuit court held this conclusion to be a question of fact behind which it cannot go, citing *Dobson v. Commissioner of Internal Revenue,* 320 U. S. 489, 88 L. Ed. 249, and *United States v. Anderson,* 269 U. S. 422, 443, 70 L. Ed. 347, 352, in support of its decision. It would seem that on the contrary this holding is in conflict with both decisions and has no "reasonable basis in the law." In the *Anderson* case this court held that findings of fact, such as those involved herein, affirmatively establish that the books of account are kept on an accrual basis. In the *Dobson* case this court held that though a court may not review a decision of the Tax Court, except upon a clear-cut mistake of law, the Tax Court's decision, however, "must have 'warrant in the record' and a reasonable basis in the law."

2. Petitioner presented the question as to whether it kept its books on the accrual basis under the provisions of Section 43 of the Revenue Act of 1936. The primary findings "misconstrued the extent of the power conferred by the revenue act." In holding that there is no clear-cut mistake of law presented, the circuit court therefore held also in conflict with the holding of this court in *Security F. M. Co. v. Commissioner of Internal Revenue,* 321 U. S. 281, 286, 88 L. Ed. 725, 729, which compared the *Dobson* case, and held that under facts similar to the in-

stant case the question is not whether the Tax Court made a determination of fact but that it is rather whether, as a matter of law, the Tax Court "misconstrued the extent of the power conferred by the revenue act."

3. It would seem that a granting of the writ would be particularly apt at this time in the interest of good administrative tax law. In the *Dobson* case this court summarized the right of review in tax matters and limited it to a clear-cut question of law. In the *Security F. M. Co.* case, thereafter decided, a majority of this court held as above stated but a minority of this court held that the case should be governed by *Dobson v. Commissioner of Internal Revenue, supra.* It would seem that this case furnishes an appropriate vehicle for further clarification of this recurrent and important question.

4. The question of whether a business concern is entitled to have adjudicated in a tax case, in lieu of declaratory relief, findings of fact made by the commissioner damaging to its assets and making uncertain its corporate and tax status in future years, is one of first instance. In any event the Tax Court made findings of primary facts favorable to the petitioner on all such issues presented, but it failed to make ultimate findings thereon. For the circuit court to have failed to make such ultimate findings, or to have required them to be made, is in conflict with *Kelleher, Exec., v. Comm.,* 94 F. (2d) 294 (C. C. A. 9th, 1938), holding that the finding of all ultimate facts by the Tax Court is a statutory duty.

5. It would also appear that with respect to the procedure referred to in the preceding paragraph that the circuit court has so far sanctioned a departure by the Tax Court from the accepted and usual course of judicial pro-

ceeding as to call for an exercise of this court's power of supervision.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said court, numbered 10959, and had in docket number 109993 of the Tax Court of the United States, to the end that this case may be reviewed and determined by this court as provided by the statutes of the United States; and that judgment herein of said circuit court and of said Tax Court be reversed and that petitioner have such further relief as to this court may seem proper.

Dated this 16th day of April, 1946.

WALTER H. MALONEY and
GEORGE ACRET,
Attorneys for Petitioner.